In the Supreme Court

Appeal from the Court of Appeals
Whitbeck, P.J., and Holbrook, Jr., and Zahra, JJ.

SANDRA GAIL FULTZ and OTTO FULTZ,
Plaintiffs-Appellees,

v. **Docket No. 121613**

UNION COMMERCE ASSOCIATES LIMITED PARTNERSHIP, COMM-CO EQUITIES, NAMER JONNA, ARKAN JONNA, LAITH JONNA, MOSHIN KOUZA, GLADYS KOUZA,
Defendants,

and

CREATIVE MAINTENANCE, LTD.,
Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT CREATIVE MAINTENANCE, LTD.

*** ORAL ARGUMENT PREVIOUSLY REQUESTED***

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STATEMENT OF FACTS

Observant of the ten-page restriction on reply briefs applicable since May 1, 2003, Creative Maintenance will address, in reply, the two issues this Court's order granting leave directed the parties to brief:

> (1) under what circumstances, if any, plaintiff can establish a duty owed to her based on a contract to which plaintiff was not a party, where neither party to the contract owes plaintiff that duty outside the contract, and (2) whether, in a premises action, the defense available to the landowner are available to a contractor acting for the landowner.

In addition, Defendant will reply on the point of the applicability of open and obvious danger doctrine to the condition of an icy parking lot.

REPLY ARGUMENT I

> **The icy condition of the parking lot the night plaintiff fell was an open, obvious danger. There were no "special aspects" to the condition, see *Lugo v Ameritech Corp*, 464 Mich 512, 517 (2001) which might differentiate this risk from typical risks and thereby potentially create an actionable unreasonable risk of harm.**

Since this Court released *Lugo v Ameritech Corp,* 464 Mich 512; 629 NW2d 384 (2001) on July 3, 2001, at least seventeen judges of the Court of Appeals, in eleven different cases, have ruled that open and obvious danger doctrine applied to slips on snow or ice and have upheld summary disposition in a defendant's favor. They have all written: (1) that an accumulation of ice or snow is an open, obvious danger, (2) not subject to the *Lugo* retention of potential liability when "special aspects" of a condition potentially make even an open and obvious risk unreasonably dangerous, such as when a risk poses a "uniquely high likelihood of harm or severity of harm" or is "effectively unavoidable." *Lugo* at 518-519. Consider:

Furstenberg v Bubbles Galore, COA # 239228, rel'd 6/26/03, Judges Sawyer, Meter & Schuette (customer slips on build up of ice at defendant's car wash) [Exh A, attached]

Feliciano v Sobczak, COA # 243096, rel'd 4/10/03, Judges Jansen, Kelly & Fort Hood (delivery person slips on ice ridge hidden by fresh snow) [Exh I to Appellant's Brief]

Golembiewski v Thomas Jarzembowski Funeral Home, COA# 238083, rel'd 3/11/03, Judges Kelly, White & Hoekstra (snow and ice on parking lot frequented by the distracted and bereaved) [Exh A to Appellant's Brief]

Gratopp v Tanger Properties, COA# 237663, rel'd 2/28/03, Judges Kelly, White & Hoekstra (snow and ice on lot, near dumpster, store employee slipped while performing required duty of closing dumpster lid; possessor granted summary disposition) [Exh H to Appellant's Brief].

Timmerman v Auto Zone, COA# 234779, rel'd 12/20/02, Judges Whitbeck, Zahra & Murray (slip on ice while crossing through handicapped parking spot) [Exh B, attached]

Delay v McLaren Regional Medical, COA# 239768, rel'd 12/13/02, Judges Bandstra, Zahra & Meter (security guard slipped on ice in the parking lot while performing work-assigned duty of bringing a car to a hospital invitee) [Exh C, attached]

King v McGrath, COA# 236979, rel'd 11/26/02, Judge Markey, Saad & Smolenski (fall on snowy icy sidewalk) [Exh D, attached]

Laurain v Sparrow Hospital, COA# 233429, rel'd 10/22/02, Judges Hoekstra, Wilder & Zahra (doctor entered hospital through a designated physician's entrance and fell on ice and snow on walkway) [Exh E, attached]

Lockhart v Wal-Mart, COA# 229750, rel'd 9/27/02, Judges Wilder, Bandstra & Hoekstra (fall on icy parking island, while plaintiff was trying to avoid falling on icy lot: another spot or another day could have been selected) [Exh F, attached]

Uptergrove v Nacu, COA# 230329, rel'd 8/20/02, Judges Zahra, Hood & Jansen (electrical contractor fell on icy, snowy patio—no special aspects) [Exh G, attached]

Corey v Davenport College, 251 Mich App 1 (2002), Judges Markey, Neff & Saad (fall on snowy, icy steps leading into college dormitory)

Joyce v Barry Rubin, 249 Mich App 231 (2002), Judges Saad, Bandstra & Whitbeck (on employee's required move-out day, denied a safer route through a garage or a rug to improve traction, she fell on snowy driveway)

This is impressive. Many of the best legal minds in the state have already rejected plaintiff's argument that her claim can survive *if*, as Creative Maintenance contended in the trial court and on appeal, the open and obvious doctrine governs.

Wisely, plaintiff does not contend that the danger was anything other than open and obvious. As this Court wrote in *Perkoviq v Delcor Homes*, 466 Mich 11, 19 (2002), even snow and ice on a sloped roof encountered by a roofer is an open and obvious danger. To potentially satisfy *Lugo's* "special aspects" where an icy condition is concerned, a plaintiff would need to show some condition distinguishing it from "the typical [place] containing ice, snow or frost." *Perkoviq* at 20. There is nothing in the present case but a typical Michigan winter icy parking lot.

Wisely, plaintiff also does not contend that the condition of falling down from a standing height created any uniquely high likelihood of severe harm. As this Court wrote in *Lugo* at 520, typical open and obvious dangers present no exacerbating special aspects because they are easily avoidable and present little risk of harm. "Unlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole," or falling on an icy parking lot, "and falling to the ground would suffer severe injury." *Id.*

Plaintiff contends only that the open and obvious danger of an iced-over parking lot was "effectively unavoidable." But Mrs. Fultz had a myriad of alternative paths, literally and figuratively. She could have left her bulky packages behind and improved her footing. She might have investigated a salted sidewalk that would have set her on her way via a safer route. She could have gone back into the store and asked that salt, kept on hand for such occasions, be spread. She could have gone back into the store and had someone call Creative Maintenance to salt the lot. Finally, Mrs. Fultz could simply have delayed going home until her safety was better assured.

Plaintiff's reliance on *Chretien v Lakeshore Motel*, COA# 221593 for instruction on how the *Lugo* special aspects analysis operates in the context of ice and snow dangers is entirely misplaced. That case was decided on June 8, 2001, prior to the release of *Lugo*. It is simply mistaken in its application of the doctrine, as subsequent case developments have clearly shown.

REPLY ARGUMENT II

The open and obvious danger defense available to possessors of the property must be equally available to snow removal contractors that the possessors hire. The existence of a snow removal contract does not create any possible end run around the applicability of open and obvious danger doctrine. This must especially be true here, where the jury decided Creative Maintenance did not breach its contract.

Plaintiff argues that the obligation to the public, in general, should be greater for those who make their livelihood pushing snow than for those who own, control, and in all other respects "possess" property held open to the public for commercial purposes. Plaintiff says "despite" lack of possession and ownership, Creative Maintenance claims the open and obvious danger defense and says the doctrine "does not apply because the plaintiff did not assert or attempt to prove at trial that defendant possessed or controlled the parking lot." Plaintiff accuses that Defendant tries to have its cake and eat it too. Plaintiff has it backward.

Creative Maintenance did not breach its contract.[1] That was what the jury found. *If* plaintiff's case is grounded in alleged negligent performance of a contract, and even *if* plaintiff's case could somehow proceed unrestrained by the traditional principles distinguishing between misfeasance and nonfeasance, what plaintiff seeks should not be supplied. This Court ought not to fashion a "contract"-based tort duty that is more comprehensive than the contract

[1] Plaintiff disputes whether Creative Maintenance's contract required that the lot be salted with every plow. That dispute was resolved by the jurors. They found that the contract had not been breached even though the evidence was that only the sidewalks and not the lot were plowed.

ever was. Stated otherwise, this Court should not honor a duty, in the name of contract, that tort law eschews: namely, a duty to protect a party from dangers that are open, obvious and possessed of none of the special aspects that tort law has identified as a plaintiff's only route to relief. When people are tripped up by open and obvious dangers, and when those dangers cannot be shown to be possessed of the special aspects *Lugo* identified as creating a potentially unreasonable risk of harm, both the possessors of the property and those that they hire to help them maintain the property must be freed of liability. Duty "stuffed" into a case against a premises possessor, or into a premises case against a non-possessor, or into a contract-based tort case against a non-possessor—the duty should be the same. All such parties should be free of liability for failure to warn or protect from open, obvious dangers, unless the *Lugo* special aspect test is met.

Plaintiff quotes cases such as *Osman v Summer Green Lawn Care*, 209 Mich App 703, 708; 532 NW2d 186 (1995) (overruled for its erroneous view of summary disposition standards at *Smith v Globe Life*, 460 Mich 446, 455; 597 NW2d 28 (1999)) for the principle that a snow removal contractor owes the public "a duty of ordinary care" separate from the contract itself. *Osman* at 710. But open and obvious danger doctrine is a doctrine that *defines* the duty of ordinary care. Where invitees encounter dangers that are known or so obvious that they must reasonably be expected to discover them, even an invitor "owes no duty to protect or warn," unless he should anticipate the harm despite the invitee's knowledge of it. *Riddle v McClouth Steel*, 440 Mich 85, 96; 485 NW2d 676 (1992). The doctrine is no "exception" to tort-based duty; instead, it is "an integral part of the definition of that duty." *Lugo, supra* at 516. The context of the *Osman* panel's observation should also be kept in mind. In that case, the court was interpreting a term in the snow removal contract where the possessor agreed that the contractor would not be liable for injuries caused by falls, but also agreed that the contractor would not be relieved of liability for injuries caused by its own negligence.

Plaintiff quotes cases accepting that "accompanying every contract is a duty to perform with ordinary care that thing agreed to be done...". *Joyce v Rubin*, 249 Mich App 241, 243; 642 NW2d 360 (2002). This has been stated regularly in the case law but, here, it begs the point and does not chart any cogent path to aid this Court's decision-making. Creative Maintenance met its contracted-for obligations and the duty of *ordinary* care does not exist where a typical, open and obvious danger is involved.

The Restatement of Torts 2d §324(A) is no safe haven for plaintiff either. That section creates potential liability if those who provide services to another regarding "the protection of a third person or his things" fails to "exercise reasonable care" but only if: (1) the risk of harm is increased, (2) they performed a duty owed by the other to the third person, or (3) the harm was suffered because of "reliance of the other or the third person upon the undertaking." There is no evidence here that Creative Maintenance increased the risk of harm. Creative Maintenance removed the snow but the duty to remedy open, obvious dangers was not a duty the possessor owed to Mrs. Fultz. Additionally, plaintiff did not fall because she or the landowners relied upon "the undertaking" [of Creative Maintenance]. Plaintiff fell because of ice on the parking lot. She cannot have relied upon Creative Maintenance removing that condition because, before she walked onto the lot, she admits that she saw the ice and still chose to proceed.

Plaintiff points out the statement of this Court in *Commercial Union Insurance v Medical Protective*, 426 Mich 109, 124; 393 NW2d 479 (1986), that under §324(A) a "breach of contractual duty [can cause] injury to a third party, who is then allowed to bring a tort action." Plaintiff simply ignores the fact that the jury found Creative Maintenance had *not* breached its contractual duty.

Whatever tort possibilities may arise when a snow removal contractor allegedly fails to protect its customers from the open and obvious danger of falling on an icy parking lot, defendant submits that the duty potentially owed must be co-extensive with the duty owed by

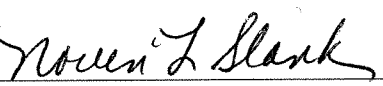
the possessor of the property. There is one fall. One patch of ice. Only one duty matters, and it is a responsibility that is shared. Where the danger is open and obvious (as here) the only duty owed is "if special aspects of the condition make even an open and obvious risk unreasonably dangerous." *Lugo* at 517.

Plaintiff's effort to find an actionable duty has taken her into a discussion of duties created by so-called "special relationships," such as doctor-patient, landlord-tenant, and the like. Appellee Brief, p 14. But a snow removal contractor has no "special relationship" with those his customers invite onto their property to serve his customer's commercial purposes. Likewise, the observation that duty can be voluntarily assumed when a party has no obligation to do so is not a principle that speaks to the present case. In this case, the parties' contract is what created Creative Maintenance's obligation. Creative Maintenance was no "volunteer."

Finally, plaintiff is curiously enamored of the unpublished Court of Appeals case of *McBride v Pinkerton*, COA# 202147, rel'd 7/2/99. It appears at a number of points in the Appellee Brief. In *McBride,* the plaintiff was a tenant of the defendant who was shot by visitors as he passed through the lobby of the apartment where he lived. Those visitors had taunted him beforehand while a Pinkerton security guard watched and did nothing to intervene. In addition, Pinkerton's contract attempted to shift the liability for any personal injury damage back to the apartment building's management company. Though people generally owe no duties to protect others from the criminal acts of third parties, that is not the case in a landlord-tenant situation. *Samson v Saginaw Professional Building*, 393 Mich 393; 224 NW2d 843 (1975); *Johnston v Harris*, 387 Mich 569; 198 NW2d 409 (1972). Obviously, a company under contract to provide security in an apartment building is also very specially situated. The Court of Appeals panel ruled that Pinkerton could be held liable for its guard's negligence in not providing more effective security. It also enforced the indemnity language that shifted responsibility for plaintiff's judgment against Pinkerton to the management company.

To discuss the *McBride* facts and its holdings shows it teaches nothing about the correct result in the present case. Pinkerton performed its contracted-for duties in a way that caused the harm that befell the plaintiff. The only fact, from defendant's perspective, that is of even remote interest is that the Court of Appeals *reversed* the trial court's grant of summary disposition in favor of the owner and the management company. *Slip Op, p 11.* This assured that the duty to take reasonable steps to prevent the harm fell equally on all the defendants: on Pinkerton whose only relationship to the property was via its contract, and on those whose duties owed were as possessor. *That* lesson, namely even-handed application of the duty owed, is a lesson that is aptly applied to the present case. When it comes to open and obvious danger defense, all the defendants ought to stand (or fall) together.

COLLINS, EINHORN, FARRELL & ULANOFF, P.C.

BY: 

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Dated: August 7, 2003
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EXHIBIT A

STATE OF MICHIGAN

COURT OF APPEALS

CANDANCE FURSTENBERG,

Plaintiff-Appellant,

v

BUBBLES GALORE and BUBBLES AND MORE, INC.,

Defendants-Appellees.

UNPUBLISHED
June 26, 2003

No. 239228
Genesee Circuit Court
LC No. 01-069543-NO

Before: Sawyer, P.J., and Meter and Schuette, JJ.

MEMORANDUM.

Plaintiff appeals as of right the order granting summary disposition to defendants under MCR 2.116(C)(10) in this premises liability action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

While using defendant's car wash, plaintiff slipped and fell on ice that had formed on a sidewalk. The trial court granted defendants' motion for summary disposition, finding that the hazard was open and obvious.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating the motion, the trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999).

As a general rule, a landowner has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm. However, the duty does not include the removal of open and obvious dangers. *Corey v Davenport College of Business (On Remand),* 251 Mich App 1, 3; 649 NW2d 392 (2002). A landowner is not required to protect an invitee from an open and obvious danger unless special aspects of the condition make it unreasonably dangerous. *Id.,* 4. Such special aspects are those that give rise to a uniquely high likelihood of harm or severity of the harm if the risk is not avoided. *Id.*

The test to determine if a danger is open and obvious is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented on

casual inspection. *Joyce v Rubin,* 249 Mich App 231, 238; 642 NW2d 360 (2002). The test is objective, and looks to whether a reasonable person would foresee the danger. *Id.,* 238-239.

In her deposition, plaintiff stated that she did not see the ice because she was looking at two men in front of her. A plaintiff's inattention is not a factor that removes a case from the open and obvious danger doctrine. *Lugo v Ameritech Corp, Inc,* 464 Mich 512, 522; 629 NW2d 384 (2001). The focus of the doctrine is on the objective nature of the condition, and not the subjective degree of care used by the plaintiff. *Id.,* 524. Where nothing concealed the ice, plaintiff failed to show a genuine issue of fact regarding the obviousness of the hazard.

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Bill Schuette

EXHIBIT B

STATE OF MICHIGAN

COURT OF APPEALS

GEORGE TIMMERMAN,

Plaintiff-Appellant,

v

AUTO ZONE, INC,

Defendant-Appellee.

UNPUBLISHED
December 20, 2002

No. 234779
Hillsdale Circuit Court
LC No. 00-000437-NO

Before: Whitbeck, C.J., and Zahra and Murray, JJ.

PER CURIAM.

Plaintiff George Timmerman appeals as of right following the trial court's order granting summary disposition to defendant Auto Zone, Inc., in this premises liability action. We affirm. We decide this case without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

On December 22, 1998, at around 9:15 a.m., Norman Ledyard drove Timmerman to the Auto Zone store in Hillsdale, Michigan. Ledyard stopped the car so Timmerman could enter the store directly, without crossing the parking lot. Ledyard, who did not go in the store, then parked his car in the fourth space from the front door. This was the first space available in which he could park because the first two spaces were designated for handicapped parking and another vehicle was occupying the third space. When Timmerman completed his purchases in the store, he walked toward where Ledyard had parked the car. As Timmerman was cutting across the two empty handicapped parking spaces, he slipped and fell on ice. He hit his left shoulder and elbow, as well as his head, on the concrete surface. Ledyard did not see the accident, but saw Timmerman on the ground. After Ledyard helped him to his feet, Timmerman went into the store to tell employees about his fall and to warn them that they needed to salt or sand the area to reduce the slippery conditions.

In April 2000,Timmerman sued Auto Zone. He claimed that he suffered severe injuries in his slip and fall on the ice and that Auto Zone had breached its duty to salt, sand, or take other precautions to prevent his accident. As one of its affirmative defenses, Auto Zone claimed that the ice was open and obvious, and therefore it was not liable for Timmerman's injuries.

In April 2001, Auto Zone moved for summary disposition, arguing that the slippery condition was not only open and obvious, but that it was apparent that Timmerman could have

walked safely to the car by using the sidewalk, which was clear of ice and snow, rather than cutting across the parking spaces. As support for this argument, Auto Zone pointed to Timmerman's deposition testimony, in which he admitted that he was not watching where he was walking when he slipped and fell even though he was aware of the cold temperature and snow on the ground. Asked whether, when leaving the store, he had seen any ice between the store's front door and the place he slipped, Timmerman said, "I didn't recognize any ice. I wasn't looking down." In fact, Timmerman did not see the ice even after he fell. He formed his opinion regarding the cause of his accident from Ledyard's observations. Ledyard described the parking space where Timmerman fell as being covered by a mixture of bare, icy, and snowy patches. Ledyard clarified that snow was not covering the ice and that he "knew there was ice on [the parking space] when I pulled in[to the parking lot]. You could see ice on the concrete." Ledyard, however, said he did not tell Timmerman about the icy conditions. Ledyard also said that he did not observe anything that looked like salt in the space where Timmerman fell, though he assumed that the store had been open since 8:00 that morning. When asked whether "there really was any other way to walk where the car was parked without going over the ice," Ledyard replied, "Yes. Right up the sidewalk." Ledyard, however, said that if someone were to walk through the parking lot, that person would have to encounter the ice to get to a parked car.

The trial court heard arguments on the motion for summary disposition in May 2001. At the time, the trial court was concerned with the evidence *not* in the record, such as the time the store opened or when the snow and ice accumulated. At the conclusion of the brief hearing, the trial court announced its decision from the bench. After reviewing the legal standards applicable to a motion for summary disposition brought under MCR 2.116(C)(10), the trial court said:

> I have read the deposition of plaintiff. Said he fell in handicap spot. Wasn't looking where he was going. Doesn't know what he fell on. There is snow on the ground. It was cold. Doesn't know if the parking lot was snow covered. Doesn't know if the parking lot was plowed. Claims the parking lot wasn't salted.
>
> Deposition of Mr. Ledyard. There was ice on the lot. You could see ice on the concrete. It was on the ground. He had no problem seeing the ice there. The ice was not covered with snow. Said that his friend, Mr. Timmerman, could have walked on the sidewalk, sidewalk had no obstructions. Just in part that's what transpired.
>
> * * *
>
> I have not – I have not one reference to a deposition. I have not one photograph. I have no affidavits. I have no documentary evidence whatsoever.
>
> The nonmoving party must by documentary evidence set forth specific facts showing there is a genuine issue for trial and may not rest upon mere allegations or denials in the pleadings. . . . That's what the Supreme Court requires. I don't have it. All I've got is general denials, mere allegations.

The trial court concluded that the record was insufficient for it to allow the case to go to trial.

On appeal, Timmerman contends that the trial court erred in granting the motion for summary disposition because: (1) the ice was not open and obvious; (2) even if the ice was open and obvious, Auto Zone had an obligation to reduce the risk the ice posed; and (3) the trial court erred in requiring him to meet a higher evidentiary burden than the standards for deciding a motion for summary disposition require.

II. Standard Of Review

This Court reviews de novo a trial court's decision to grant a motion for summary disposition.[1]

III. Summary Disposition

A motion for summary disposition under MCR 2.116(C)(10) tests the factual underpinnings of a claim other than an amount of damages, and the deciding court considers all the evidence, affidavits, pleadings, admissions, and other information available in the record.[2] The deciding court must look at all the evidence in the light most favorable to the nonmoving party, who must be given the benefit of every reasonable doubt.[3] "The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment."[4] Only if there is no factual dispute would summary disposition be appropriate.[5] However, the nonmoving party must present more than mere allegations in order to demonstrate that there is a genuine issue of material fact in dispute, making trial necessary.[6]

IV. Premises Liability

"[A] landowner has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land."[7] A landowner typically does not have a duty to remove open and obvious dangers because the invitee knows or can reasonably be expected to discover the dangerous conditions himself.[8] In this case, the evidence on the record establishes that the icy condition of the parking space was open and obvious because an "average" person "with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection."[9] Ledyard testified directly that the icy

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[1] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[2] MCR 2.116(G)(5); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

[3] *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1998).

[4] *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

[5] See *Auto Club Ins Ass'n v Sarate*, 236 Mich App 432, 437; 600 NW2d 695 (1999).

[6] MCR 2.116(G)(4); *Etter v Michigan Bell Telephone Co*, 179 Mich App 551, 555; 446 NW2d 500 (1989).

[7] *Corey v Davenport College of Business*, 251 Mich App 1, 3; 649 NW2d 392 (2002).

[8] *Id.*

[9] *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

condition was plainly visible as he drove into the parking lot. Timmerman, who said that he was not watching where he was walking, pointed to no contradictory evidence. The record leaves no doubt that an average person with ordinary intelligence would have been able to discover the icy concrete and the risk it presented had they been looking at the ground.

Because there is no factual dispute that this danger was open and obvious,

> "the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the 'special aspect' of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability."[10]

Although he never uses the precise terminology, Timmerman contends that the special aspect of this ice was that an invitee had no choice but to encounter it in order to reach a car parked in the parking lot. However, he points to no place in the record that says that the ice was unavoidable. In fact, Ledyard said that people could avoid the ice simply by walking on the cleared sidewalk. Evidently, only a person who steered clear of the safe sidewalk to cross the openly and obviously icy parking lot itself would encounter the ice. Thus, as in other recent cases involving slips and falls on ice, the trial court properly granted summary disposition to Auto Zone.[11]

Further, though Timmerman contends that the trial court applied an incorrect evidentiary burden to him when examining the evidence, we disagree. Case law does not require a party opposing summary disposition to *present* additional evidence to counter the grounds for the motion – at least if the evidence presented by the moving party reveals a material factual dispute. Still, as the trial court properly recognized, if the moving party's evidence on the record supports granting the motion for summary disposition, the nonmoving party must come forward with evidence of the material factual dispute to survive the motion.[12] Timmerman did not do so.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Christopher M. Murray

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[10] *Corey*, *supra* at 6, quoting *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2002), quoting *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517-518; 692 NW2d 384 (2001).

[11] See *Corey*, *supra* at 6-9.

[12] See MCR 2.116(G)(4).

EXHIBIT C

LEXSEE

JOHN DELAY and VICKI DELAY, Plaintiffs-Appellants, v McLAREN REGIONAL MEDICAL CENTER, Defendant-Appellee.

No. 239768

COURT OF APPEALS OF MICHIGAN

2002 Mich. App. LEXIS 2121

December 13, 2002, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Genesee Circuit Court. LC No. 01-069408-NI.

DISPOSITION: Affirmed.

JUDGES: Before: Bandstra, P.J., and Zahra and Meter, JJ.

OPINION: PER CURIAM.

Plaintiffs appeal by right from an order granting summary disposition to defendant in this negligence case. We affirm.

On January 12, 2001, plaintiffs filed a complaint alleging that plaintiff John Delay (hereinafter "Delay") sustained a broken leg and other injuries on February 18, 2000, when he slipped while walking in a Flint parking lot owned by defendant. The complaint asserted that Delay, at the time of the accident, was employed by Burns Security, was assigned to the McLaren Regional Medical Center, and slipped on ice in the parking lot while "in the process of getting a car for a person who was at the hospital." Plaintiffs alleged that defendant negligently failed to maintain the parking lot in a safe condition, negligently failed to inspect the parking lot, and negligently failed to remove snow and ice from the parking lot. Delay's wife, Vicki, claimed loss of consortium as a [*2] result of Delay's injuries.

On December 14, 2001, defendant moved for summary disposition under MCR 2.116(C)(10), claiming that (1) the "natural accumulation of snow and/or ice" on which Delay allegedly slipped was an open and obvious condition with respect to which no duty existed; (2) defendant was not negligent because it "complied with its obligation to take reasonable measures within a reasonable period of time after the accumulation [of] snow and ice to diminish the hazard . . .;" and (3) Delay, as an employee of Burns Security, which contracted with defendant, was a co-employee of defendant and thus was obligated to use workers' compensation as his exclusive remedy.

Defendant attached to its motion the deposition of Delay. Delay testified, in part, as follows: The accident occurred around 8:30 p.m. - after dark - on the day in question. The temperature was "approximately 28 degrees," and there "was a wet snow, on and off," that had been occurring all day and that was sticking to the ground. He was assigned to a security cruiser by Burns Security. In the evenings, it was his job to retrieve vehicles from the hospital's valet parking lot. He drove to the lit valet lot to retrieve [*3] a vehicle and noted that "there [were] no tracks in any of the snow, and the snow was approximately four inches deep, five inches deep." It appeared to him that the lot had not been cleared that day, despite the wet and heavy snow. As he was clearing the windows of the vehicle he had set out to retrieve, he slipped on some ice hidden underneath the snow and broke his leg. He had to have a plate and screws installed in his leg.

Delay admitted that "there was a lot of snow" and that "they attempted to keep [the lots] clear the best they could . . . ." He further admitted that he did not complain to anyone that the lots had not been sufficiently cleared on the day in question.

Among other documents, defendant also attached to its motion the deposition of Rande Lake, a maintenance supervisor with defendant. Lake testified that no formal records were kept regarding when each lot was plowed on the day in question but noted that "we followed our policy and our practices." He testified that overtime employees were brought in to clear snow that day and that the valet lot was likely cleared of snow approximately every hour. He also noted that a process was in place by which security employees **[*4]** could contact the engineering department through the operator if they believed that a particular area needed plowing. He stated:

> It can be done one of several ways. A phone call to our office should be general operating hours [sic] and we'll relay the message to the folks that are outside. The operator takes calls and relays by means of radio, a handy talky [sic] that the truck drivers carry with them or snowplow drivers carry with them. And the crew themselves are in communication with each other as they're out in the lots taking care of business.

Lake asserted that security people in the past had "absolutely" contacted the engineering department to clear snow "when they [saw] the need in a particular area . . . ."

On December 26, 2001, plaintiffs filed an answer to defendant's motion for summary disposition, arguing that (1) the open and obvious defense was unavailable in this case because Delay was required to enter the parking lot, despite the danger, as part of his job; (2) there were questions of fact regarding whether defendant's snow-clearing efforts on the day in question were adequate; and (3) Delay was not required to seek solely workers' compensation **[*5]** benefits because defendant did not meet its burden of establishing that it and Burns Security were coemployers.

Among other documents, plaintiffs attached to their answer a report filed by another Burns Security employee who was working on the evening in question. The report noted that the snow in the lot was approximately four to five inches deep and that the "lots had not been plowed or salted yet."

The trial court ruled for defendant, relying on *Lugo v Ameritech Corp, Inc, 464 Mich. 512; 629 N.W.2d 384 (2001).* n1 The court stated that the snow was "four or five inches" high and was "open and obvious to the plaintiff on this particular occasion." The court further stated:

> In this particular situation it's open and obviously, as indicated, the snow, and ice accompanies snow, it has been snowy wet all day and the Court believes that the Court has no choice but to grant the motion under *Lugo* and *Denoyer.*

n1 The trial court also relied on the unpublished case of *Denoyer v Freedman,* unpublished opinion per curiam of the Court of Appeals, issued August 15, 2000 (Docket No. 218963), in which the Court held that a mail carrier had no cause of action for negligence after she slipped and fell on an obviously snowy and icy porch.

[*6]

The trial court rendered no decision on the workers' compensation issue, finding that it had too little information to do so. The court later denied plaintiffs' motion for reconsideration, stating that "there is nothing unusual about finding snow and ice in a parking lot in Michigan during a winter storm" and that "the risk did not remain unreasonable despite its obviousness, and despite knowledge of it by the invitee."

Plaintiff now asks us to reverse the trial court's grant of summary disposition to defendant. We decline to do so.

We review a trial court's grant of summary disposition de novo. *Wilcoxon v Minnesota Mining & Mfg Co, 235 Mich. App. 347, 357; 597 N.W.2d 250 (1999).* In reviewing a motion granted under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to determine if any genuine issue of material fact exists. *Wilcoxon, supra at 357-358.* We resolve all legitimate inferences in favor of the nonmoving party. *Id. at 358.*

Plaintiffs contend that the trial court should not have granted summary disposition to defendant because the parking **[*7]** lot was unreasonably dangerous. Plaintiffs concede for purposes of appeal that the danger was open and obvious n2 but contend that because Delay was *required* to walk across the parking lot as part of his job, and because the parking lot was dangerous, the open and obvious defense was inapplicable. Plaintiffs cite *Lugo, supra at 517-518,* in support of this proposition. In *Lugo, supra at 517,* the Court stated:

> In sum, the general rule is that a premises possessor is not required to protect an invitee from open and obvious

> dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.

> n2 Despite plaintiffs' concession, we nonetheless explicitly find that the trial court did not err in concluding that the condition was open and obvious.

The *Lugo* Court went on to note that an "effectively unavoidable" open and obvious **[*8]** condition could be considered unreasonably dangerous. *Id. at 518.* As an example, the Court mentioned "a commercial building with only one exit for the general public where the floor is covered with standing water." *Id. at 518.*

Plaintiffs contend that the ice and snow at issue in this case are comparable to this example taken from *Lugo.* Plaintiffs argue that because Delay *had* to traverse the ice and snow or else suffer consequences with regard to his job, the condition was unreasonably dangerous. While this argument has some appeal in light of the example set forth in *Lugo*, we note that the *Lugo* example is obiter dictum because it was not necessary to the disposition of the case. See, generally, *Luster v Five Star Carpet Installations, Inc, 239 Mich. App. 719, 730 n 5; 609 N.W.2d 859 (2000).* Accordingly, because the example is obiter dictum, it is not binding upon this Court. *Cheron, Inc v Don Jones, Inc, 244 Mich. App. 212, 216; 625 N.W.2d 93 (2000).*

A more instructive, and, in our view, dispositive, case is *Joyce v Rubin, 249 Mich. App. 231; 642 N.W.2d 360 (2002).* **[*9]** In *Joyce,* the plaintiff, who had been working as a live-in caregiver for one of the defendants, contended that the icy steps on which she fell while moving her belongings were unreasonably dangerous because she was essentially forced to use the steps. *Id.* at 233, 241. The plaintiff contended that her employer demanded she move from the house in question on a snowy day and "refused to provide safety measures or an alternative route" for moving her belongings. *Id.* This Court stated:

> Though Joyce says that she had no choice but to traverse the slippery walkway to the front door, she presents no evidence that the condition and surrounding circumstances would "give rise to a uniquely high likelihood of harm" or that it was an unavoidable risk. First, Joyce could have simply removed her personal items another day or advised Debra Rubin that, if Rubin did not allow her to use the garage door, she would have to move another day. Further, unlike the example in *Lugo,* Joyce was not effectively trapped inside a building so that she *must* encounter the open and obvious condition in order to get out. [*Id.* at 242 (emphasis in original).]

In the instant case, Lake **[*10]** specifically testified that a process was in place by which security personnel could contact the engineering department to deal with unplowed lots, and Delay admitted that he did not contact anyone about the valet lot being dangerous. Delay could have notified the person whose vehicle he was attempting to retrieve from the valet lot that he had to wait for the snow and ice to be cleared before the vehicle could be retrieved. Delay proffered no evidence that he would have suffered adverse job consequences for doing this. Moreover, Delay was not "effectively trapped inside a building so that [he had to] encounter the open and obvious condition in order to get out." *Id.* Accordingly, we hold that "no reasonable juror could conclude that the aspects of the condition were so unavoidable that [Delay] was effectively forced to encounter the condition." n3 *Id.* at 242-243.

> n3 Moreover, although plaintiffs do not explicitly argue to the contrary, we note for the sake of completeness that the open and obvious condition itself (i.e., without regard to its avoidable or unavoidable nature) was not "so unreasonably dangerous that it would create a risk of death or severe injury." *Joyce, supra 243.*

[*11]

In light of *Joyce,* we hold that the trial court did not err in granting summary disposition to defendant.

Affirmed.

/s/ Richard A. Bandstra

/s/ Brian K. Zahra

/s/ Patrick M. Meter

EXHIBIT D

LEXSEE

KAREN L. KING, Plaintiff-Appellant, v GERRY MCGRATH, Defendant-Appellee.

No. 236979

COURT OF APPEALS OF MICHIGAN

2002 Mich. App. LEXIS 1820

November 26, 2002, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Monroe Circuit Court. LC No. 00-011630-NO.

DISPOSITION: Affirmed.

JUDGES: Before: Markey, P.J., and Saad and Smolenski, JJ.

OPINION: MEMORANDUM.

Plaintiff appeals as of right the order granting defendant's motion for summary disposition in this slip and fall case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was injured when she slipped and fell on a snow-covered, icy sidewalk at defendant's home. The trial court found that the danger was open and obvious, and granted defendant summary disposition under MCR 2.116(C)(10).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating the motion, the trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood, 461 Mich. 109, 120;* [*2] *597 N.W.2d 817 (1999).* This Court reviews de novo decisions on motions for summary disposition. *Spiek v Dep't of Transportation, 456 Mich. 331, 337; 572 N.W.2d 201 (1998).*

At the time of the injury, plaintiff was living with defendant. A social guest is a licensee who assumes the ordinary risks associated with the visit. *Stitt v Holland Abundant Life Fellowship, 462 Mich. 591, 596; 614 N.W.2d 88 (2000).* A landowner owes a licensee a duty to warn of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. *Id.*

In *Joyce v Rubin, 249 Mich. App. 231; 642 N.W.2d 360 (2002),* the plaintiff was injured when she fell on a snow-covered sidewalk. This Court found that the open and obvious danger doctrine applies to cases involving both the duty to warn and the duty to maintain premises. *Id.,* 237. The defendant had no duty to remove an open and obvious danger where a reasonable person would have [*3] been able to discover the condition and the risk it presented. *Id.,* 238-239. A snowy sidewalk is not a special risk that gives rise to an unreasonably dangerous condition. *Id.,* 241.

Where the condition was open and obvious, plaintiff failed to establish that defendant breached a duty owed to her as a licensee. The trial court properly granted defendant's motion. Affirmed.

/s/ Jane E. Markey

/s/ Henry William Saad

/s/ Michael R. Smolenski

EXHIBIT E

LEXSEE

JOHN LAURAIN, Plaintiff-Appellant, v EDWARD W. SPARROW HOSPITAL ASSOCIATION and DENT ENTERPRISES, INC., d/b/a BENJAMIN PARKING LOT MAINTENANCE COMPANY, Defendants-Appellees.

No. 233429

COURT OF APPEALS OF MICHIGAN

2002 Mich. App. LEXIS 1447

October 22, 2002, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING.

the motion. The trial court granted summary disposition in favor of defendants. The court found that reasonable minds could not disagree that the snow and ice was an open and obvious hazard and that the undisputed

open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand), 198 Mich. App. 470, 474-475; 499 N.W.2d 379 (1993).* However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect invitees from that risk. If such special aspects are lacking, the open and obvious condition is **[*4]** not unreasonably dangerous. *Lugo v Ameritech Corp, Inc, 464 Mich. 512, 517-519; 629 N.W.2d 384 (2001).*

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendants. He maintains that the open and obvious danger doctrine does not bar an action for injuries caused by the failure to remove snow and ice, citing *Quinlivan v Great Atlantic & Pacific Tea Co, Inc, 395 Mich. 244, 261; 235 N.W.2d 732 (1975).* We disagree and affirm. Plaintiff's reliance on *Quinlivan*, *supra*, for the proposition that the open and obvious danger doctrine does not apply in cases involving an accumulation of snow and ice is misplaced. That case rejected the proposition that ice and snow are obvious hazards in all circumstances and cannot give rise to liability, but did not hold that the open and obvious danger doctrine is always inapplicable in cases involving snow and ice. *Id.* The *Quinlivan* analysis is now more properly seen as part of the issue of whether there are special aspects of the condition that make it unreasonably dangerous in spite of its open and obvious condition. *Corey v Davenport College of Business (On Remand), 251 Mich. App. 1, 6-9;* **[*5]** *649 N.W.2d 392.*

In the instant case, it was undisputed that the snow and ice on the walkway was open and obvious, and that plaintiff observed the condition before he attempted to traverse the walkway. Furthermore, plaintiff acknowledged that he attempted to use the walkway to the physician's entrance notwithstanding the fact that he knew that other entrances to the building were available. Plaintiff failed to demonstrate the existence of any special aspects that made the condition unreasonably dangerous in spite of its open and obvious condition. *Lugo, supra;* see also *Joyce v Rubin, 249 Mich. App. 231, 240-242; 642 N.W.2d 360 (2002).* Summary disposition was proper. *Corey*, *supra*.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra

EXHIBIT F

LEXSEE

LOIS LOCKHART, Plaintiff-Appellee, V WAL-MART STORES, INC., Defendant-Third-Party Plaintiff-Appellant, and KEVIN SEIF, d/b/a/ SEIF LAWN CARE AND SNOW PLOWING, Third-Party Defendant.

No. 229750

COURT OF APPEALS OF MICHIGAN

2002 Mich. App. LEXIS 1475

September 27, 2002, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Kent Circuit Court. LC No. 97-009640-NO.

JUDGES: Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

OPINION: PER CURIAM.

In this premises liability action, defendant Wal-Mart Stores, Inc., appeals by right from the circuit court's judgment in favor of plaintiff Lois Lockhart following a bench trial. We reverse.

I. Facts and Proceedings

On March 15, 1997, plaintiff drove to defendant's store on 28th Street in Grand Rapids with her friend, Jetty Spidell, to purchase some yarn. Because of the poor weather conditions on the two days preceding their visit to the store, they waited until the 15th to go. n1 Plaintiff parked her car in a parking space at the end of a row, closest to the entry of the store. Because of Spidell's advanced age, plaintiff wanted to park as close to the entrance as possible. When she pulled into the parking space, the driver's side of her car was approximately twelve inches from an elevated island at the end of the row of spaces. As plaintiff pulled into the parking space, she noticed that [*2] the island was covered with snow. When she opened her car door, she saw that there was also snow and ice on the pavement along the side of her car, covering the area between her car and the island. Because she thought she might slip and fall under her car if she walked along the side of the car toward the back of the vehicle, she decided to walk across the parking island. She stepped up onto the island and when she took her second step, her feet went out from under her and she fell, hitting her head on the cement curbing on the far side of the island and breaking her right wrist. Plaintiff did not know what caused her to fall.

n1 On March 13 and 14, Grand Rapids incurred rain, snow, freezing rain, and freezing fog.

Spidell did not see that plaintiff had fallen and exited the car on the passenger's side, walked around the back of the car, and proceeded into the store. Plaintiff was assisted into the store, and one of defendant's employees contacted plaintiff's son, Glenn Lockhart, who then came to the store and [*3] took plaintiff and Spidell to the hospital. Plaintiff needed six to eight stitches to close the cut on her head, completed by emergency room personnel that day, and closed reduction and pin fixation of her wrist, completed the following day.

Plaintiff filed suit against defendant on September 17, 1997, alleging that defendant had failed to maintain the premises in a safe condition and had failed to remove the snow and ice. The case was tried by the court on June 21, 2000. Defendant argued at trial that its duty to plaintiff did not include clearing the parking island of snow and ice and that, in any event, the open and obvious doctrine precluded plaintiff's claims. In support of its argument, defendant referred to the testimony of

David Seif, who was responsible for snow removal at the store. He testified that his commercial customers had never requested that he remove snow and ice from parking islands.

In a written opinion, the trial court concluded that defendant's duty to maintain its premises in a reasonably safe condition extended to the parking island, particularly in light of the fact that many customers walked across the island, as defendant had invited them to do by placing **[*4]** it between the parking space and the store entrance. Moreover, it found that defendant had breached its duty to its invitee by failing to diminish the hazards of ice and snow within a reasonable time, both in the parking spaces and on the parking island. The court also found that the open and obvious doctrine did not prohibit plaintiff's recovery in this case because the ice on the island was covered by a layer of snow, concealing the danger from plaintiff, and that the layer of snow was "hardly an obvious hazard." Nevertheless, the court continued, even if the open and obvious doctrine was implicated in this case, its application was limited because defendant was still expected to take reasonable precautions to clear the path to its store when there was no reasonably convenient alternative route to the entrance. The court assessed plaintiff's damages at $ 41,603.90. n2 Defendant now appeals.

II. Standard of Review

n2 After deducting payments from collateral sources and adding statutory interest, taxable costs, and case evaluation sanctions, the judgment in plaintiff's favor totaled $ 52,642.51.

------ **[*5]**

We review the trial court's findings of fact in a bench trial for clear error and review de novo its conclusions of law. *Chapdelaine v Sochocki, 247 Mich. App. 167, 169; 635 N.W.2d 339 (2001).*

III. Analysis

Defendant argues that the risk of harm associated with the condition of the parking island was open and obvious, and that, therefore, it did not owe any duty to plaintiff. Defendant also argues that even if the risk was not open and obvious, its duty to maintain the premises did not extend to the parking island. Because we conclude that the open and obvious doctrine precludes plaintiff's claims, we do not need to address whether defendant's general duty extends to the parking island.

Defendant, as a possessor of land, generally owes its invitee a duty to "exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc, 464 Mich. 512, 516; 629 N.W.2d 384 (2001).* By and large, this duty does not require the removal of open and obvious dangers. *Id.* A condition is open and obvious if "an average user of ordinary intelligence [would] **[*6]** have been able to discover the danger and the risk presented upon casual inspection." *Joyce v Rubin, 249 Mich. App. 231, 238; 642 N.W.2d 360 (2002),* quoting *Novotney v Burger King Corp (On Remand), 198 Mich. App. 470, 475; 499 N.W.2d 379 (1993).*

In the present case, the trial court concluded that because there had been freezing rain during the two days prior to plaintiff's fall, it was reasonable to infer that the snow on the island hid ice beneath it. The snow itself, the court stated, was "hardly an obvious hazard." We disagree. We find that the condition was open and obvious. The snow was readily apparent upon casual inspection, and even if ice was hidden beneath the snow on the island, it is reasonable to expect an average user of ordinary intelligence to recognize that after two days of freezing rain accompanied by snow, the surface might be slippery because of either ice or snow.

When a condition is open and obvious, the possessor will not be liable unless special aspects of the condition create an unreasonable risk of harm. *Lugo, supra at 516-517.* One special aspect that can make a condition unreasonably **[*7]** dangerous is unavoidability. *Id. at 517.* Here, the trial court found that regardless of whether the condition was open and obvious, defendant still owed a duty to plaintiff because there was no reasonably convenient alternate route for plaintiff to take. However, plaintiff testified that she had the option of parking in other parking spaces. She may have been inconvenienced by choosing another parking spot, but she clearly could have done so. The situation plaintiff faced was not unavoidable. See *Joyce, supra at 242* (the plaintiff could have returned on another day to avoid the danger presented by a slippery walkway).

Special aspects of a condition that "impose an unreasonably high risk of severe harm" can also make the condition unreasonably dangerous. *Lugo, supra at 518.* For example, "an unguarded thirty foot deep pit . . . would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition . . . ." *Id.* The ordinary dangers of the snow and ice plaintiff encountered, however, do not rise to this level. Therefore, the condition was not unreasonably **[*8]** dangerous, and defendant did not owe any duty to plaintiff.

Plaintiff argues that the open and obvious doctrine does not apply to snow or ice, citing *Quinlivan v Great*

Atlantic & Pacific Tea Co, Inc, 395 Mich. 244; 235 N.W.2d 732 (1975), where the Court stated that an invitor has a duty to remove accumulations of snow and ice within a reasonable time. *Id.* at 261. However, in *Corey v Davenport College (On Remand), 251 Mich. App. 1, 8; 649 N.W.2d 392(2002),* this Court held that:

> after analyzing both *Lugo* and *Joyce*, we conclude that these prior analyses in *Quinlivan* and *Bertrand* on the interplay between the open and obvious danger doctrine when it involves snow and ice and the newly refined definition of open and obvious in *Lugo* can only mean that the snow and ice analysis in *Quinlivan* is now subsumed in the newly articulated rule set forth in *Lugo*. Specifically, the analysis in *Quinlivan* will now be part of whether there are special aspects of the condition that make it unreasonably dangerous even if the condition is open and obvious. [*Id.* at 8.]

Based on *Corey*, then, **[*9]** the issue remains whether the condition was unreasonably dangerous, and *Quinlivan* does not alter our analysis.

Reversed and remanded for judgment in favor of defendant. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

EXHIBIT G

LEXSEE

MICHAEL UPTERGROVE, Plaintiff-Appellant, v JANET NACU, Defendant-Appellee.

No. 230329

COURT OF APPEALS OF MICHIGAN

2002 Mich. App. LEXIS 1214

August 20, 2002, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Washtenaw Circuit Court. LC No. 99-005374-NO.

DISPOSITION: Affirmed.

JUDGES: Before: Zahra, P.J., and Hood and Jansen, JJ.

OPINION: PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition for defendant in this premises liability case. We affirm.

Plaintiff is an electrical contractor who was hired to help with the remodeling of defendant's kitchen. On December 5, 1997, plaintiff and two employees arrived at defendant's home to install phone lines and repair a circuit. The ground was covered with snow, but it was not snowing at the time.

In the course of his work, plaintiff found it necessary to access the home's crawl space. Plaintiff exited the house, walked across defendant's back patio toward the crawl space, and slipped and fell on the patio. Plaintiff suffered a broken leg as a result of the fall. Plaintiff brought the instant action, alleging defendant was negligent in failing to properly clear the snow and ice from the patio and failing to warn him of the patio's slippery condition. [*2] Defendant brought a motion for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that plaintiff's claim failed because the undisputed facts established defendant had no notice that plaintiff would be traversing the patio and the danger associated with the patio was open and obvious. The trial court granted summary disposition for defendant.

On appeal, plaintiff first argues that the trial court's order granting summary disposition must be reversed because the court did not specify whether the motion was granted under MCR 2.116(C)(8) or (C)(10). We disagree. A review of the record establishes that defendant and the trial court relied on documentary evidence outside of the pleadings to support the motion. Therefore, notwithstanding that the court did not specify the subsection on which it relied, we consider the motion as granted under (C)(10). *Spiek v Dep't of Transportation, 456 Mich. 331, 338 n 9; 572 N.W.2d 201 (1998); Driver v Hanley (After Remand), 226 Mich. App. 558, 562; 575 N.W.2d 31 (1997); Shirilla v Detroit, 208 Mich. App. 434, 436-437; 528 N.W.2d 763 (1995).* n1

n1 Given that defendant's motion was not granted under MCR 2.116(C)(8), we need not consider plaintiff's second issue on appeal, which focuses solely on whether summary disposition was proper under (C)(8).

[*3]

Plaintiff also argues that the trial court erred in granting summary disposition for defendant because there are disputed issues of fact in regard to whether the circumstances required defendant to inspect and clear the patio and to warn plaintiff of its dangerous condition. We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood, 461 Mich. 109, 118; 597 N.W.2d 817 (1999).* In reviewing a motion under MCR 2.116(C)(10), this Court considers the

affidavits, pleadings, depositions, admissions or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists. *Ritchie-Gamester v City of Berkley, 461 Mich. 73, 76; 597 N.W.2d 517 (1999); Rollert v Dep't of Civil Service, 228 Mich. App. 534, 536; 579 N.W.2d 118 (1998).* All reasonable inferences are resolved in the nonmoving party's favor. *Hampton v Waste Mgt of MI, Inc, 236 Mich. App. 598, 602; 601 N.W.2d 172 (1999).*

Generally, an invitor owes a duty to his invitees to exercise reasonable **[*4]** care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc, 464 Mich. 512, 516; 629 N.W.2d 384 (2001).* That duty involves inspecting the premises and making any necessary repairs or warning of discovered hazards. *Stitt v Holland Abundant Life Fellowship, 462 Mich. 591, 597; 614 N.W.2d 88 (2000).* The duty does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers that are known to an invitee or so obvious that an invitee can be expected to discover them himself. *Lugo, supra*, quoting *Riddle v McLouth Steel Products Corp, 440 Mich. 85, 96; 485 N.W.2d 676 (1992).* An "open and obvious" danger is one that a person of ordinary intelligence would discover upon casual inspection. *Novotney v Burger King Corp (On Remand), 198 Mich. App. 470, 475; 499 N.W.2d 379 (1993).* However, even in the event that the danger is open and obvious, if "special aspects" of a condition make an open and obvious risk unreasonably dangerous, the possessor has a duty to take reasonable **[*5]** precautions to protect invitees from the risk. *Lugo, supra at 517,* citing *Bertrand v Alan Ford, Inc, 449 Mich. 606, 611; 537 N.W.2d 185 (1995).*

Here, plaintiff testified that prior to crossing the patio, he noticed it was covered with a light dusting of snow. Plaintiff stated that he was familiar with Michigan winters and acknowledged that he could not see whether there was ice underneath the snow. Plaintiff testified that he knew there was concrete underneath the snow. Under these circumstances, the danger of slipping on the patio was open and obvious to a person of ordinary intelligence. *Novotney, supra.* See *Perkoviq v Delcor Homes - Lake Shore Pointe, LTD, 466 Mich. 11, 16; 643 N.W.2d 212 (2002), Corey v Davenport College of Business*, __ Mich. App. __; __ N.W.2d __ (Docket No. 206185, issued 4/26/02), slip op p 4, and *Joyce v Rubin, 249 Mich. App. 231, 239; 642 N.W.2d 360 (2002).* Consequently, defendant owed no duty to plaintiff with respect to the slippery condition of the patio. *Lugo, supra at 516.* Plaintiff does not argue that any **[*6]** special aspects made the open and obvious risk unreasonably dangerous. We have found no special aspects in this case and, therefore, conclude that summary disposition was proper based on the open and obvious nature of the hazard. *Id. at 517.* n2

n2 Given our conclusion, we need not consider whether summary disposition was also proper based on defendant's alleged lack of notice that plaintiff would traverse her back patio.

Affirmed.

/s/ Brian K. Zahra

/s/ Harold Hood

/s/ Kathleen Jansen